Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1994

EVANS KOUKIOS, d/b/a
SCIENTIFIC INFORMATION SYSTEMS,
Petitioner,

v.

MARKETING DYNAMICS, INC., d/b/a
LITE AMERICA,
Respondent.

Writ Of Certiorari
To The Ohio Court of Appeals
For The First Appellate District at Hamilton County
And The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a civil litigant voluntarily dismisses a complaint pursuant to the Rules of Civil Procedure in the face of a defendant's counterclaim, should the dismissing plaintiff be precluded from raising such claims and new claims against the defendant in subsequent litigation?

2. Are the due process provisions of the Ohio Constitution and the United States Constitution violated when a civil plaintiff is precluded from refiling a complaint involving original claims and new claims when the first complaint was voluntarily dismissed pursuant to the Ohio Rules of Civil Procedure?

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III. OPINIONS BELOW

The decision of the Court of Common Pleas of Hamilton County, Ohio in Koukios v.Marketing Dynamics, Case No. A-9209214, entered March 16, 1993 is set out as Appendix A at App1.

The Opinion of the Court of Appeals for Hamilton County, Ohio in Koukios v. Marketing Dynamics, reported under Case Nos. C-920913,C-920918,C-930289 and C-930555 entered on September 7, 1994 is set out as Appendix B at App15.

The Entry of the Ohio Supreme Court denying the Motion for Jurisdiction to hear the appeal from Hamilton County Court of Appeals in Koukios v. Marketing Dynamics in Case No. 94-2265 is set out as Appendix C at App68.

IV. JURISDICTIONAL STATEMENT

The Court of Appeals for Hamilton County, Ohio First Appellate District of Ohio, rendered its decision on September 7, 1994. The Petitioner, Evans Koukios, filed a Memorandum in Support of Jurisdiction in the Ohio Supreme Court seeking review of the Court of Appeal's decision. The Ohio Supreme Court issued an order on March 1, 1995 in which it declined to grant jurisdiction to hear the appeal from the First Appellate District of Ohio.

The Petitioner seeks a Writ of Certiorari from the United States Supreme Court to review the decision and judgment of the Court of Appeals for the First Appellate District of Ohio and the Ohio Supreme Court. Jurisdiction in the

Supreme Court is found in 28 U.S.C. Sec. 1257 and 28 U.S.C. Sec. 2101(c)

V. CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life,liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution, Article I, Section 16

> All courts shall be open, and every person, for an injury done him in his land, goods,person, or reputation, shall have remedy by due course of law, and shall have justice administrered without denial or delay.

Ohio Rules of Civil Procedure, Rule 41 (A)(1)(a)

> Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the Plaintiff withoutorder of court (a) by filing a notice of dismissalat any time before commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been servedby the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeard in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as anadjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

VI. STATEMENT OF THE CASE

The Petitioner, Evans Koukios, d/b/a Scientific Information Systems, instituted the underlying action in October, 1991 when he filed a breach of contract claim against Marketing Dynamics, Inc. Marketing Dynamics, Inc. was granted an extension of time for four months to file a response to the Plaintiff's Complaint and to answer interrogatories submitted to Marketing Dynamics, Inc. In February, 1992, Marketing Dynamics, Inc. filed an Answer and Counterclaim against the Petitioner. An arbitration, that had been set before the Answer and Counterclaim were filed, was cancelled and a trial date was set for October 1, 1992.

In June, 1992, based upon the Counterclaim and evidence discovered

during the course of discovery, Petitioner, Evans Koukios, moved the trial Court for leave to amend his Complaint both to add claims for trade secret violations, tortious interference with business and conspiracy and also to add an additional party defendant. Marketing Dynamics, Inc. objected and the trial court denied leave to amend the Complaint. Evans Koukios filed a Motion to Reconsider with the Court and three weeks before the scheduled trial date, the trial Court again denied leave to amend the Complaint. Marketing Dynamics then served extensive and oppressive trial subpoenas on customers of Evans Koukios two weeks before the trial. Mr. Koukios moved the quash the subpoenas and to continue the trial. The Motion to Continue the Trial was denied. The pre-

trial hearing was cancelled by the trial court originally assigned to the case and the case was assigned to a visiting judge.

On the scheduled day of trial, Mr. Koukios voluntarily dismissed his complaint, as permitted by Rule 41(A)(1)(a), Ohio Rules of Civil Procedure. The visiting judge, before starting trial, inquired whether the Counterclaim of the Defendant, Marketing Dynamics, Inc., could remain for independent adjudication. Having received the agreement of both parties that the Counterclaim could be independently adjudicated, the trial court allowed the Complaint to be voluntarily dismissed. Under the Ohio Rules of Civil Procedure, the voluntary dismissal was without prejudice.

After trial to the Court only on the Counterclaim of the Defendant, the Court rendered a judgment on the Defendant's counterclaim in the amount of Five Thousand Six Hundred Fifty Dollars ($5,650.00). This judgment was later reduced to Two Thousand Four Hundred Fifty Dollars ($2,450.00) after appellate decision that the judgment was against the manifest weight of the evidence.

During the course of the trial on the Counterclaim, Evans Koukios filed a new action against Marketing Dynamics, Inc. as well as a company called Total Access Technologies. The new complaint raised the claims which Evans Koukios sought to bring in the amended complaint which he had sought to file in the underlying action.

After judgment was rendered in the

underlying action on the Counterclaim of Marketing Dynamics, Inc., Marketing Dynamics, Inc. instituted a garnishment action against Evans Koukios. The garnishment sought an amount in excess of the judgment amount and in excess of the amount of court costs allowed by the trial court. The excessive and improper garnishment by Marketing Dynamics, Inc. was eventually overturned and Evans Koukios was awarded the return of his funds together with interest, although in an amount less than that sought by Evans Koukios.

In the second Complaint that was filed during the pendency of the trial on the Counterclaim of Marketing Dynamics, Inc., Marketing Dynamics, Inc. filed a Motion to Dismiss under Rule 12(B), Ohio Rules of Civil Procedure, or, in the

alternative, a Motion for Summary Judgment. The same trial court that had refused to allow Mr. Koukios to amend his Complaint granted the Motion to Dismiss filed by Marketing Dynamics, Inc. and ruled that the decision on the Defendant's Counterclaim in the first trial was "*res judicata*" to the second Complaint being filed.

Petitioner, Evans Koukios, raised the claims of due process in his oral argument before the Court of Appeals for the First Appellate District of Ohio in arguing that the judgment on the Counterclaim of Marketing Dynamics, Inc. should not have been "*res judicata*" to a second complaint being filed. The Court of Appeals for the First Appellate District of Ohio denied the Petitioner's claim for relief. The Petitioner sought

leave to appeal to the Ohio Supreme Court. In the Memorandum in Support of Jurisdiction the Petitioner stated to the Ohio Supreme Court that the holding of the Court of Appeals "...denies civil litigants the right to due process of law and the right to have justice administered without denial or delay as is guaranteed by the Ohio Constitution, Article I, Section 16." The Ohio Supreme Court refused to grant jurisdiction to hear the appeal. It was from this denial of the grant of jurisdiction to hear the appeal that the Petitioner has filed the Petition for Writ of Certiorari to this Court.

VII. ARGUMENT

A. If a state's Civil Rules of Procedure allow the voluntary dismissal of a complaint to be without prejudice, then the doctrine of "*res judicata*" should not act as a bar to the filing of a subsequent complaint for such claims or additional claims.

At the heart of this action is the provision of Rule 41(A)(1)(a) of the Ohio Rules of Civil Procedure. Under that rule a plaintiff may dismiss an action without order of court by filing a Notice of Dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant. Under this rule, the voluntary dismissal is without prejudice. After the filing of the second complaint, the Defendant,

Marketing Dynamics, Inc. moved to dismiss the Petitioner's Complaint on the grounds that the Counterclaim in the first suit became the complaint when the Plaintiff voluntarily dismissed his Complaint and that, thereafter, the Plaintiff was then required to file a compulsory counterclaim under Rule 13, Ohio Rules of Civil Procedure. Marketing Dynamics, Inc. then argued that since no counterclaim had been filed to the Counterclaim it had filed, that the Plaintiff was then barred under the doctrine of "*res judicata*" after the trial and judgment on the Counterclaim. Before the trial was completed on the Counterclaim, however, Evans Koukios filed a second complaint against Marketing Dynamics, Inc. to add the claims that it wished to have brought in

its amended complaint against Marketing Dynamics, Inc. and Total Access Technologies. This case was assigned to the same trial judge that had been assigned the first complaint filed by Evans Koukios. Under the Rules of Civil Procedure, if the Defendant's Counterclaim became the functional equivalent of the Complaint, then Evans Koukios should have had Twenty-Eight (28) days to have filed a responsive pleading, including the Counterclaim, to the Defendant's Counterclaim. The trial on the Defendant's Counterclaim was concluded before that time period had run to file a responsive pleading.

The decision of the Court of Appeals for the First Appellate District of Ohio dismissing the Plaintiff's Complaint in the second action on the grounds of "*res*

judicata" was based upon a decision from the Ohio Supreme Court under Rettig Enterprises, Inc. vs. Koehler 68 Ohio St. 3d 274, 626 N.E.2d 299 (1994).

In Rettig, supra, the plaintiff's complaint was dismissed by the court without prejudice pursuant to Rule 41(A), Ohio Rules of Civil Procedure. After a dismissal of the plaintiff's complaint, the defendant's counterclaim proceeded to trial with the plaintiff defending the counterclaim. When the plaintiffs refiled their complaint, the counterclaimants argued that the plaintiff's complaint were compulsory counterclaims under Rule 13(A), Ohio Rules of Civil Procedure in the prior actions and that the new complaints had to be dismissed under the theory of "*res judicata*". The Court of Appeals for

Hamilton County, Ohio did not acknowledge that under Rettig, supra the Ohio Supreme Court had recognized that there were situations where a plaintiff's complaint had been dismissed without prejudice and that proceeding on the counterclaim was not necessarily a bar to a refiling of the plaintiff's complaint in all situations. (See Rettig, supra, p. 278, f.n.1) A simple decision to dismiss the plaintiff's second complaint on the grounds of "*res judicata*" because of a counterclaim in the first suit exalts form over substance and completely emasculates the purpose of the Ohio Rules of Civil Procedure to provide rules that "effect just results". Rule 1(B), Ohio Rules of Civil Procedure. The Ohio Rules of Civil Procedure are remarkably similar to the Federal Rules of Civil

Procedure. This Court long ago held that the Federal Rules of Civil Procedure "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley vs. Gibson, 355 U.S. 41, 48 (1957)

Lower federal courts have recognized that there are times when there should be exceptions to the compulsory counterclaim rule and that the failure to have filed a counterclaim should not be fatal to the plaintiff's complaint. In United States vs. Snider, 779 F.2d 1151 (6th Cir. 1985), the court held that even though Rule 13(A) of the Federal Rules of Civil Procedure might require a compulsory counterclaim to bring all of the claims

into one action, where rules do not require a pleading, either because of pending motions or because of the usual process by which the issues are formed, has been displaced by the accelerated process permitted under Rule 65, the compulsory counterclaim requirement of Rule 13(A) is inapplicable. Snider, supra at p. 1156. See also Martino vs. McDonalds System, 598 F.2d 1079, 1082, cert. denied 444 U.S. 966 (7th Cir. 1988)

To allow the decision to stand as rendered by the Ohio First District Court of Appeals, in reality means that the Civil Rules of Procedure in Ohio do not mean what they say and lead to the unjust result of completely eliminating the plaintiff's day in court.

The courts in Ohio have consistently held that a voluntary dismissal by the

plaintiff under Rule 41(A)(1)(a), Ohio Rules of Civil Procedure, is truly voluntary, without prejudice and the trial court loses all jurisdiction to affect the plaintiff's complaint. Standard Oil Company vs. Grice, 46 O.App.2d 97, 345 N.E.2d 458 (1975); Zimmie vs. Zimmie, 11 Ohio St. 3d 94, 464 N.E.2d 142 (1984). To achieve the result which the Court of Appeals has done in this action means that the dismissal was not "without prejudice" but, in fact, was very prejudicial to the plaintiff. A civil rule should be used to "effect just results and not to preclude a party from having his day in court". Peterson vs. Teodosio, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973).

In this action, the Petitioner, Evans Koukios, was placed in a "Catch 22"

position by reason of the trial court's refusal to allow him to amend his Complaint in the first instance. Mr. Koukios believed that he had legitimate claims to be raised against Total Access Technology, as well as additional claims to raise against Marketing Dynamics, Inc. In the underlying case, the trial court denied Mr. Koukios leave to amend his Complaint filed only four months after the Answer to the Complaint was filed. Mr. Koukios did not dismiss his Complaint but asked that the Court reconsider its decision. Three weeks before trial the Court denied the Motion to Reconsider. If Mr. Koukios had proceeded to trial on his Complaint under the logical extension of the Court of Appeals' decision, he would be precluded from bringing any additional claims against Marketing

Dynamics, Inc. in a second suit because they had not been raised in the first suit. However, he had been precluded from amending his Complaint to bring in new claims. Thus, the Petitioner was effectively in the position of being completely unable to bring any new claims against Marketing Dynamics, Inc. after he had originally filed his Complaint.

It simply cannot be just that the Petitioner, Evans Koukios, is placed in the position that because the trial court would not allow him to amend his Complaint, he could not bring any new claims against the Defendant-Counterclaimant, Marketing Dynamics, Inc. Mr. Koukios made a determination that the best way to handle the additional claims that he had against Marketing Dynamics, Inc. and to conclude the litigation was

to bring a new action in which all of his claims against Marketing Dynamics, Inc. were raised. Mr. Koukios believed that this would be the best method to achieve the desired result of avoiding a multiplicity of litigation. However, the Defendant-Counterclaimant, Marketing Dynamics, Inc., decided that it wished to proceed with its Counterclaim. Absolutely no prejudice came to Marketing Dynamics, Inc. by allowing it to proceed on its Counterclaim in the face of the voluntary dismissal. Mr. Koukios, however, has been greatly prejudiced even though the Civil Rules provide that his voluntary dismissal was without prejudice, which should mean that he is permitted to refile his Complaint.

Further, Mr. Koukios has been denied the right to enjoy the same time periods

that other litigants are granted to bring their "compulsory" claims. If, in fact, the Counterclaim of Marketing Dynamics, Inc. became the Complaint when Mr. Koukios dismissed his Complaint, then Mr. Koukios was entitled to twenty-eight (28) days to file his Answer. When he was not given that time period, he was effectively denied the rights that are provided to all other litigants under the Civil Rules.

B. Procedural due process requires that a litigant be given a realistic and meaningful opportunity to present all of his claims in court.

In the normal and orderly progression of cases, the Petitioner in this action, Evans Koukios, would have filed his Complaint on an account and the Defendant would have raised as a

counterclaim any claims it may have had for a breach of contract. In the present case, however, after the Defendant had filed its Answer and Counterclaim and had provided discovery nearly five months had passed since the filing of the Complaint. The Defendant had been given this additional time to respond by the Court.

The Plaintiff, upon reviewing the discovery and conducting additional investigations, determined that he had additional claims to bring against the Defendant, Marketing Dynamics, Inc., as well as an additional party, Total Access Technologies. The Plaintiff then sought to amend his Complaint to bring in these additional claims and additional party. This is the action that would be expected of him under the Rules of Civil

Procedure. The Court, nonetheless, denied the Motion to Amend the Complaint, claiming that the Plaintiff had waited too long to raise the additional claims even though only eight months had passed since the filing of the Complaint and only three additional months had passed since the initial round of discovery had been provided by the Defendant. The Plaintiff believes that any quicker action without fully investigating the potential claims would have been imprudent on his part.

When the Court denied the Motion to Amend, the Plaintiff sought a reconsideration from the trial court which was not finally resolved until three weeks before the scheduled trial date. Because of additional activities which had taken place with regard to

subpoenaing all of the Plaintiff's clients, the Plaintiff believed that a dismissal of his Complaint and a refiling of a new Complaint was the best course of action for him to get his claims and causes of action before the Court.

There is no question that an unsecured claim for an unpaid bill is an intangible interest in property that is protected by the United States Constitution Fourteenth Amendment's Due Process clause. Tulsa Professional Collection Service, Inc. vs. Pope, 485 U.S. 478 (1988). Further, causes of action are generally treated as a species of property protected by the Fourteenth Amendment's Due Process clause. Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

The claims of Evans Koukios for

unpaid bills against Marketing Dynamics, Inc., as well as his causes of action against Marketing Dynamics, Inc. and Total Access Technologies for trade secret violations, are property interests which must be protected. Mr. Koukios has the right to proceed on these claims and this right should not be taken away without notice and a realistic and meaningful opportunity to be heard.

The Respondent would undoubtedly argue that Mr. Koukios had his opportunity to be heard and that he waived this opportunity by voluntarily dismissing his Complaint. Under the Ohio Rules of Civil Procedure, Mr. Koukios had the right to dismiss the Complaint prior to the commencement of the trial under Rule 41(A)(1)(a), Ohio Rules of Civil Procedure, which clearly provided that

the dismissal would be without prejudice. Without prejudice means that Mr. Koukios should have the right to refile the Complaint. Mr. Koukios did refile the Complaint, bringing in the additional claims that he had against Marketing Dynamics, Inc., as well as the claims against Total Access Technologies. This additional Complaint, however, was dismissed by the trial court on the basis of "*res judicata*".

Mr. Koukios was put in the position where he was unable to amend his Complaint to bring in the additional claims. He also faced the prospect that if he continued to trial against Marketing Dynamics, Inc., he would potentially lose any right to bring additional claims in the future on the basis of "*res judicata*" or collateral

estoppel. Further, he had claims against both Marketing Dynamics, Inc. and Total Access Technologies that realistically should have been brought in one action.

When the case proceeded to trial on the Defendant's Counterclaim only, it seems almost ludicrous to argue that the Plaintiff was not allowed to amend his Complaint to bring additional claims or an additional party, but that he would be permitted to file a compulsory counterclaim to the Defendant's Counterclaim in which he could raise additional claims and an additional party. It must also be remembered that the dismissal only occurred after the trial court denied the request to continue the trial date so that these matters could be sorted out.

Once the Court proceeded with the

trial on the Counterclaim, it is the position of Marketing Dynamics, Inc. that its counterclaim assumed the cloak of a plaintiff's complaint, requiring the Plaintiff to then file a compulsory counterclaim. The Defendant, Marketing Dynamics, Inc., seeks to impose the requirements of Rule 13(A), Ohio Rules of Civil Procedure, requiring a compulsory counterclaim. Until such time as the Plaintiff's Complaint was dismissed, the Plaintiff was never in a position where he even arguably had to file a compulsory counterclaim. If, in fact, Evans Koukios was then put into the position where he had to file a compulsory counterclaim, he had a time period of twenty-eight (28) days under the Rules of Civil Procedure. The trial court certainly did nothing to reduce that time period or indicate to

Mr. Koukios that if he did not file a counterclaim, he would lose the right to file a claim against Marketing Dynamics, Inc.

In fact, the Court conducted a hearing to determine whether the Counterclaim of Marketing Dynamics, Inc. could remain for independent adjudication. The Court conducted a hearing in which it advised the parties that it would not permit the dismissal of the Plaintiff's Complaint unless the Defendant's Counterclaim could remain for independent adjudication. Having satisfied itself that the Counterclaim of Marketing Dynamics, Inc. could remain for independent adjudication, the trial court allowed the trial to proceed with the knowledge and understanding and agreement that the Plaintiff's Complaint would be

refiled.

The Plaintiff, Evans Koukios, has been placed in the position where one Ohio Rule of Civil Procedure, namely Rule 41(A)(1)(a), gives him the right to voluntarily dismiss his Complaint and advises him that the dismissal will be without prejudice to refiling. Further, Section 2305.19, Ohio Revised Code, provides that a dismissal without prejudice can be refiled within a one year period of time. The trial court, then taking a tortured view of Rule 13(A), Ohio Rules of Civil Procedure, provides that the Plaintiff should have filed a compulsory counterclaim to the Defendant's Counterclaim even though the trial court would not permit the Plaintiff to amend his Complaint. The alleged failure to file a compulsory

counterclaim led the Court to the decision that the Plaintiff's claims were then barred under the doctrine of "*res judicata*". What one Rule of Civil Procedure in Ohio grants on one hand, the trial and appellate courts in Ohio would take away in the other hand, citing Rule 13(A), Ohio Rules of Civil Procedure. This tortured interpretation of the rules, especially where the plaintiff was not granted the time periods required by the rules to even file a compulsory counterclaim, leads to a very unjust and inequitable result which is tantamount to denying the plaintiff his day in court. The denial of a judicial forum for a party to have his case heard deprives the party of his right to procedural due process. Logan vs. Zimmerman Brush Co., 455 U.S. 422, 429 (1982). The Fourteenth

Amendment's Due Process clause prevents states from denying potential litigants the use of established adjudicatory procedures when such an action would be the equivalent of denying them the opportunity to be heard upon their claimed right. Boddie vs. Connecticut, 401 U.S. 371, 380 (1971).

The actions of the trial court and the Court of Appeals have the effect of denying the Plaintiff, Evans Koukios, of his day in court and an opportunity to be heard on his Complaint and all of the claims that he had against Marketing Dynamics, Inc. and Total Access Technologies.

C. The Ohio Courts imposition of its civil rules denies a litigant of the exercise of fundamental constitutional rights when he is permitted to voluntarily dismiss a complaint

but is then precluded from refiling the complaint.

Under the Ohio Rules of Civil Procedure a plaintiff has the absolute right to voluntarily dismiss a complaint as long as the dismissal is before the commencement of the trial. Rule 41(A)(1)(a) of the Ohio Rules of Civil Procedure specifically provides that the dismissal is without prejudice. The only impediment to the voluntary dismissal is if there is a counterclaim that cannot be independently adjudicated. If the counterclaim can be independently adjudicated, then the plaintiff can voluntarily dismiss his complaint.

The decision of the Court of Appeals for Hamilton County, Ohio in interpreting and applying the decision of the Ohio Supreme Court in Rettig, supra has the effect of denying the plaintiff this

right to voluntarily dismiss the complaint. The decision of Rettig, supra and the Court of Appeals for Hamilton County, Ohio provides that if a plaintiff voluntarily dismisses a complaint and the defendant has a counterclaim which is adjudicated, the adjudication of the counterclaim precludes the litigation of the plaintiff's complaint in a subsequent action under the theory of "*res judicata*". This interpretation of the Rules of Civil Procedure, that if the counterclaim is litigated, the plaintiff in the action has a duty to file a compulsory counterclaim for all claims that he might have against the defendant effectively bars the voluntary dismissal of the complaint and puts the plaintiff in a position where he cannot rely upon clear right granted by the Rules of Civil

Procedure.

Article I, Sec. 16 of the Ohio Constitutional provides, in part, that:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. ..."

Article I, Sec. 16 of the Ohio Constitution guarantees, among other things, that an individual who suffers an injury or loss by the actions of another has the right to a remedy by due course of law. The "due course of law" provision of Article 1, Sec. 16 of the Ohio Constitution is considered the equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution.

According to the principles of due process, governmental actions which limit

the exercise of "fundamental" constitutional rights are subject to the highest level of judicial scrutiny. NAACP vs. Alabama, ex rel. Patterson 357 U.S. 449 (1958). If legislative actions restrict the exercise of fundamental rights, a statute would be considered unconstitutional under the "strict scrutiny" standard unless it is shown to be necessary to promote a compelling governmental interest. Shapiro vs. Thompson 394 U.S. 618 (1969).

The same should be true of governmental actions undertaken pursuant to Rules of Procedure for the Court System. If the court rules or their implementation deny a person of the fundamental right to bring his action in court and to have his day in court, then such action should be considered to be

unconstitutional.

Under the Rules of Civil Procedure as interpreted by the Ohio courts in this action, a party may dismiss his complaint and refile it if there is no counterclaim. However, if there is a counterclaim, then the party truly cannot voluntarily dismiss his complaint without prejudice because the rules are interpreted to provide that if there is a counterclaim, then the plaintiff must file a compulsory counterclaim setting forth any claims that he may have raised in the first complaint as well as any additional claims that he might have. The only compelling interest that the courts could show would be to avoid a multiplicity of suits. To avoid one additional suit at the risk of preventing a plaintiff from bringing his actions in

court for injuries or losses that he has suffered seems to be much too high a price to pay for the plaintiff's actions.

It hardly seems compelling that a plaintiff who is not faced with a counterclaim can voluntarily dismiss his complaint and file a new action but that a plaintiff faced with a counterclaim cannot be put in the same position. It does not seem that the rule would prevent a multiplicity of suits if that is the only compelling interest that is served by having the interpretation of the Rules of Civil Procedure that the Ohio courts have imposed in this case.

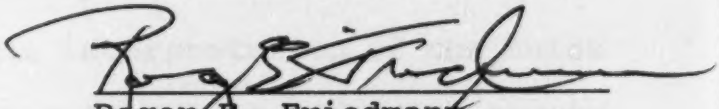
The plaintiff, Evans Koukios, by the imposition of the Rules of Civil Procedure in the Ohio court system, has been denied his fundamental right to have his claims for damages and losses decided

in court as guaranteed by the Ohio and United States Constitutions.

CONCLUSION

For all of the reasons set forth above, the Petitioner, Evans Koukios, is entitled to his day in Court. Constitutional fairness and procedural due process should dictate that he be permitted to present his claims. The Petitioner respectfully requests that this Court grant the requested Writ of Certiorari to review the decisions of the Ohio Courts below.

Respectfully submitted,



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APPENDIX A

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

EVANS KOUKIOS, dba Scientific Information Systems	:	CASE NO. A-9209214
Plaintiff	:	
vs.	:	ENTRY AND DECISION
MARKETING DYNAMICS, INC., et al	:	
Defendants	:	

This matter comes before the Court on the motion of Marketing Dynamics, Inc. ("MDI") to dismiss plaintiff's complaint as to the defendant MDI pursuant to Civ. R. 12(B)(6), or in the alternative, to enter summary judgment pursuant to Civ. R. 56 on the ground that the claims asserted in plaintiff's complaint in the

present action against defendant MDI are barred under the doctrine of *res judicata*. MDI contends that as plaintiff's claims against the defendant MDI were compulsory counterclaims in a prior suit between plaintiff and defendant MDI plaintiff waived them by failing to assert them in the prior action.

On October 8, 1991 plaintiff Evans Koukios dba Scientific Information Systems, ("Koukios") brought suit against defendant MDI in the Court of Common Pleas for Hamilton County, Ohio in an action entitled Koukios vs. Marketing Dynamics, Inc., Case No. A-9108767. In that complaint Koukios alleged that it had entered into an agreement with MDI to obtain computer hardware and to design and install computer software for the use of MDI. The complaint further alleged

that portion of the computer software to be provided by Koukios was for the conversion of certain computer software already used by MDI, that a portion of the work to be provided was the conversion of the computer software from an older computer language to a newer computer language; that the computer software was to be used in a "telemarking" operation being "set" out by the defendant, that MDI was to order the necessary hardware from Koukios at a cost-plus arrangement but that MDI purchased some additional hardware outside of this cost-plus arrangement and that therefore there was due and owing Koukios from MDI the sum of $42,860.83. The plaintiff further asserted that it had performed all the obligations required under the agreement for the

conversion of computer software and for the provision of new computer software as well as computer hardware necessary to operate the computer system.

In response to this complaint, defendant MDI filed a counterclaim alleging, in essence, that the plaintiff had failed to substantially perform under the disputed contract, had misrepresented and perpetuated a fraud upon MDI which caused MDI to hire another computer software company to fix and otherwise repair the errors in the Koukios software delivered to MDI. On October 12, 1992, just before the trial of that action, the plaintiff Koukios voluntarily dismissed the action against MDI. The matter proceeded to trial on the counterclaim of MDI, Koukios choosing not to pursue a counterclaim to MDI's claim against it.

Judgment was awarded in favor of the defendant MDI on its counterclaim against Koukios.

The issue before this Court at this time is whether Koukios' failure to proceed on any compulsory counterclaims it had to MDI's claim against it at trial constitutes *res judicata* with respect to these claims of Koukios. Civ R. 13(A), with respect to compulsory counterclaims, provides, in pertinent part,

> "A pleading shall state as the counterclaim any claim which at the time of serving the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim..."

Plainly the test then to determine whether a counterclaim is compulsory under Civ. R. 13(A) is whether the claim arose out of the same transaction or

occurrence that is the subject matter of the opposing party's claim. The purpose of the rule is to achieve resolution of all disputes arising out of common matters in a single lawsuit and to prevent multiplicity of actions.

Koukios further contends that even should Civ. R. 13(A) ordinarily be applicable, here there was no requirement to assert a counterclaim to a counterclaim, that its original complaint was properly dismissed subject to Civ. R. 41(A) and that refiling is permissible. However, such rationale flies in the face of the purpose behind Civ. R. 13(A) and would continuously defeat the efficient adjudication of cases. Consequently, in Lenihan vs. Shumaker, (9th District, May 6, 1987), Supp. App. 1214, unreported, the Court found that in a similar

situation Civ. R. 41(A) did not remove the requirement of asserting a compulsory counterclaim under 13(A).

In that case the plaintiff-client had brought a malpractice action against defendant-attorney who had counterclaimed for attorney's fees. Prior to trial the plaintiff voluntarily dismissed her claim; however, the defendant-attorney continued to pursue his counterclaim and received final judgment on the counterclaim for fees. The plaintiff-client then sought to refile her malpractice claim under the one year rule normally afforded to plaintiffs that voluntarily dismiss a suit pursuant to Civ. R. 41(A). The Court of Appeals upheld the trial court's dismissal of this refiled complaint on the grounds that her claim was a compulsory

counterclaim to the defendant-attorney's counterclaim, and that as he had pursued the counterclaim to final judgment, any claim she might have had arising out of the same transaction or occurrence was barred on the grounds of *res judicata*. See also Dungan vs. Bryant, March 2, 1983, Loraine App. 3393, unreported.

This Court adopts that reasoning. Consequently, to the extent that the claims here of Koukios in this action would have been compulsory counterclaims in the previous action, they must be dismissed under the doctrine of *res judicata*. The Court therefore addresses to the extent to which this is the case. Koukios' first claim, which is virtually identical to its original complaint, is a breach of contract action. The contractual claim Koukios seeks to assert

against MDI here directly relates and arises from the claim asserted by MDI against Koukios in the previous action. In particular, MDI in its counterclaim, alleged that it contracted with Koukios to transfer various computer programs and files from a computer that it was using to a new system; that the transfer was to be completed by the end of July, 1990; that billing was to be accomplished in a certain manner; that the total bill was to be $52,000.00; and that Koukios would supply a computer program system that would meet the well established and known needs of MDI.

The complaint further alleges Koukios failed to provide counterclaimant with the billings as agreed and that contrary to the terms of the contact Koukios provided services that were

neither necessary nor authorized for the transfer of the software system to the new hardware computer system. It further alleges that Koukios billed counterclaimant for learning how to accomplish this task contrary to the terms of the contract and that it failed to competently perform the work it did perform. It further alleges that Koukios billed MDI an excessive amount for this amount. Consequently, under Civ. R. 13(A) the claim which Koukios now asserts against MDI, to wit, breach of contract, arises out of the transaction or occurrence that is the subject matter of MDI's claim against Koukios and does not require the presence of third parties over whom the Court cannot acquire jurisdiction for its resolution. It therefore was required to be asserted

against the defendant, MDI, in the previous case. The second and third claims relate to actions of a second defendant, Total Access Technologies, ("TAT") and not MDI. Consequently, they are not at issue here.

In its fourth claim Koukios asserts that as part of its contractual arrangement with MDI it provided MDI with "trade secret information," and that MDI converted this trade secret information to its own use in violation of R.C. 1333.51. As the trade secret conveyance solely arose in the context of the contractual arrangement between MDI and Koukios, it arises out of the transaction or occurrence that is the subject matter of MDI's claim and therefore must have been asserted as a compulsory counterclaim.

For the above-stated reasons, the Court finds that the motion to dismiss the complaint as to MDI on the grounds that these claims were compulsory counterclaims and therefore must have been asserted by the Koukios and are now barred under the doctrine of res judicata is well taken and it is granted.

There is no just cause for delay,

SO ORDERED.

Ann Marie Tracey, Judge

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

EVANS KOUKIOS d/b/A SCIENTIFIC INFORMATION SYSTEMS	:	Case No. A9209214 (Judge Tracey)
Plaintiff	:	JUDGMENT
vs.	:	
MARKETING DYNAMICS, INC. et al.	:	
Defendants	:	

THIS ACTION came on for consideration before the Court upon Defendant MDI's Motion to Dismiss, and the issues having been duly considered and a decision having duly rendered and an entry granting said motion having been duly entered.

It is ordered and adjudged that the

plaintiff take nothing, that the action be and the same is dismissed on the grounds that it is barred as being res judicata, and that Defendant MDI recover of Plaintiff Koukios its costs of action.

Dated at Cincinnati, Ohio, this ___ _ day of_____,
1993.

_____
Judge Ann Marie Tracey

APPENDIX B

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

EVANS KOUKIOS, d/b/a SCIENTIFIC INFORMATION SYSTEMS,	:	APPEAL NOS. C-920913 C-920918 C-930289 C-930555
Plaintiff-Appellant/ Cross-Appellee,	:	TRIAL NOS. A- A-9209214
vs.	:	D E C I S I O N.
MARKETING DYNAMICS, INC.,	:	
Defendant-Appellee/ Cross-Appellant	:	
and	:	
TOTAL ACCESS TECHNOLOGIES,	:	
Defendant.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed in Part, Reversed in Part, and Cause Remanded in C-920913; Affirmed in C-920918, C-930289, C930555

Date of Judgment Entry on Appeal: September 7, 1994

Roger E. Friedmann, Esq., No. 0009874, 2150 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant/ Cross-Appellee,

Heuck & Ganson Co., L.P.A., and Michael B. Ganson, Esq., No. 0015944, 2440 Society Bank Center, 36 East Seventh Street, Cincinnati, Ohio 45202, for Defendant-Appellee/Cross-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeals, the transcripts of the dockets, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, and the briefs and arguments of counsel.

I. STATEMENT OF THE CASE

These appeals and cross-appeals are from a $5,650 judgment in favor of Marketing Dynamics, Inc., ("MDI") against Evans Koukios, of Scientific Information Systems, for breach of contract. In the assignments of error raised by Koukios and MDI, five issues merit consideration: (1) the consequences to Koukios of the Civ.R. 41(A) voluntary dismissal of his complaint when the trial court subsequently adjudicated MDI's

counterclaims; (2) the damages awarded to MDI; (3) the trial court's discretion to tax depositions as costs; (4) the effect of the trial court's refusal to grant a continuance; and (5) protection by work product for MDI's expert witness who was not scheduled to testify. We reverse the judgment on the amount of damages awarded to MDI, but, on all other issues, we affirm the judgment of the trial court.

Marketing Dynamics, Inc., raises funds for nonprofit organizations. (T.p. 286.) In 1990, when MDI began to expand its operations, it contracted with Evans Koukios to develop a computer system for internal operations. (T.p. 288.) Koukios's services for MDI consisted of selecting and supplying computer hardware, converting software programs,

and writing additional software for the system. (MDI, Exh. 2.) After the system was installed, the programs developed problems. When Koukios billed MDI for amounts in excess of the project's anticipated budget, MDI refused to continue paying on its account. To remedy the defects in the computer system, MDI turned to a new programming company, Total Access Technologies ("TAT").

On October 8, 1991, Koukios sued MDI for $42,860.83, the unpaid portion under the contract. (T.d. 1, A-9108767.) On February 20, 1992, MDI answered the complaint and counterclaimed for $28,350 compensatory damages for Koukios's incompetent performance and $90,000 punitive damages for his "unconscionable" behavior. On June 15, 1992, after

initial discovery, Koukios moved to amend his complaint to add a trade-secret claim against MDI and to join TAT as a party defendant on new claims for tortious interference with the contract and trade-secret violations. (T.d. 23.)

The trial court found that Koukios's motion was not timely and denied his request for leave to amend the complaint. Koukios then moved to compel the deposition of MDI's expert, TAT president, Fred McDowell. In response to MDI's argument that it retained McDowell as an expert in anticipation of litigation and not as a witness for trial, the trial court also denied that motion. On the trial date, October 1, 1992, after the trial court denied his motion for a continuance, Koukios voluntarily dismissed his complaint under

Civ.R. 41(A). MDI, nevertheless, proceeded to trial on its counterclaims. Seeking to resurrect his dismissed claims, Koukios filed a new complaint against MDI and TAT (A-9209214). In that second complaint, he refiled his original claims and his new trade-secret claim against MDI and joined his tortious-interference and trade-secret claims against TAT.

At the conclusion of the trial on A-9108767, the trial court entered judgment in favor of MDI for $5,650. From that judgment, both parties appeal (C-920913 [Koukios], C-920918 [MDI]). The trial court subsequently dismissed Koukios's second complaint. From that judgment MDI and Koukios appeal (C-930289 [Koukios], C-930555 MDI]). In this consolidated action, Koukios sets out

eight assignments of error; MDI asserts five cross-assignments of error.

II. ASSIGNMENTS OF ERROR

A. Motion to Amend

In his first assignment of error, Koukios argues that the trial court erred by not allowing him to amend his initial complaint in A-9108767. After a responsive pleading, a party may amend its complaint "only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires." Civ.R. 15(A). An appellate court will not reverse the trial court's decision to overrule a motion for leave to amend unless there has been an abuse of discretion. Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113, 122. It is an abuse of discretion not to allow

amendment to a pleading if: (1) a party timely files and establishes factual support for newly pleaded matters, (2) the adverse party is not prejudiced, and (3) there are no other reasons for denying the motion. Wilmington Steel Products, Inc. v. Cleveland Elec. Illuminating Co. (1991), 60 Ohio St.3d 120, 122, 573 N.E.2d 622, 624; Solowitch v. Bennett (1982), 8 Ohio App.3d 115, 117, 456 N.E.2d 562, 564-65. In Wilmington Steel, the trial court did not abuse its discretion by denying motions to amend when the movant made requests eleven and four days before trial seeking to add two new claims that were supported with only a paucity of evidence. Wilmington Steel at 122, 573 N.E.2d at 614-25.

Koukios argues that the trial court

abused its discretion because, unlike the party in Wilmington Steel, he filed his motion three and one-half months before the trial date and based his amended complaint on information received during discovery. He admits in his brief, however, that had he been allowed to amend the complaint, the trial court would have had to continue the trial to accommodate objections raised by MDI. He also concedes that he would have asked TAT to testify at trial, in effect, obviating the trial court's refusal to compel discovery on grounds of work product.

Even if we assume that the trial court should have granted the motion to amend, Koukios's argument still must fail. When a plaintiff voluntarily dismisses its claims, the parties are

left in exactly the same position as if the original complaint had never been filed. De Ville Photography, Inc. v. Bowers (1959), 169 Ohio St. 267, 272, 159 N.E.2d 443, 446-47. After the dismissal, the trial court does not have jurisdiction to take any further action in the matter. State ex rel. Hunt v. Thompson (1992), 63 Ohio St.3d 182, 183, 586 N.E.2d 107, 108; Rice v. McGrath (1991), 62 Ohio St.3d 70, 71, 577 N.E.2d 1100, 1101. Neither are the court's preceding incidental findings and orders subject to *res judicata*. De Ville Photography at 272, 159 at 446-47. Because the preceding incidental orders are not binding on either party, they are not final appealable orders. Id.; Central Mut. Ins. Co. v. Bradford-White Co. (1987), 35 Ohio App.3d 26, 28, 519 N.E.2d

422, 424 (involuntary dismissal without prejudice); R.C. 2505.02.

In this case, the trial court in its judgment entry and accompanying opinion properly limited its adjudication to the counterclaims raised by MDI.[1] Because of Koukios's voluntary dismissal, the trial court's order did not adjudicate his complaint. Therefore, the incidental order denying the motion to amend is not *res judicata* and is not a final appealable order. The first assignment of error is overruled.

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[1]Koukios did not attempt an interlocutory appeal based on the order that denied his motion to amend. (T.d. 23, 80.) Even if that action would have been considered final and appealable under R.C. 2505.02, this court did not have jurisdiction to consider the order because it lacked Civ.R. 54(B) language. (T.d. 27, 39.) Noble v. Caldwell (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381, 1385, Central Mut. Ins. Co. at 27, 519 N.E.2d at 424.

B. Dismiss Complaint

In his eighth assignment of error, Koukios contends that the trial court erred by dismissing his second complaint in A-9209214. MDI contends that, subject to Civ.R. 13(A), the issues in Koukios's complaint, which he voluntarily dismissed, became compulsory counterclaims when MDI proceeded on its own counterclaims. MDI argues that Koukios's failure to refile those claims now bars them under the doctrine of *res judicata*.

Civ.R. 13(A) requires that "all existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit." Rettig Enterprises, Inc. v. Roehler (1994), 68 Ohio St.3d 274, 626 N.E.2d 99, syllabus (construing Civ.R.

13[A]). If a claim from the transaction or occurrence existed at the time of the original pleading, it is a compulsory counterclaim and must be asserted in the current action. Rettig Enterprises at 277, 626 N.E.2d at 102. If the compulsory counterclaim is not brought in the existing action, it will be barred by the doctrine of *res judicata*. Geauga Truck & Implement Co. v. Juskiewicz (1984), 9 Ohio St.3d 12, 14, 457 N.E.2d 827, 829; Rettig Enterprises, syllabus. Even when a plaintiff's claim originally was filed as a complaint that later was dismissed voluntarily, if the defendant's own counterclaims proceed to trial, the plaintiff's claim is a compulsory counterclaim and is barred if it is not asserted in the existing action. Rettig Enterprises at 277-27, 626 N.E.2d

at 102; Stern v. Whitlatch & Co. (1993), 91 Ohio App.3d 32, 631 N.E.2d 680; see, also, Lenihan v. Shumaker (May 6, 1987), Summit App. No. 12814, unreported; Dungan v. Bryant (Mar. 2, 1983), Lorain App. No. 3393, unreported (both cited with approval in Rettig Enterprises).

In this case, Koukios filed his complaint against MDI. MDI then filed its counterclaims. Koukios voluntarily dismissed his complaint, and MDI proceeded on its counterclaims. The trial court entered judgment for MDI. Under Rettig Enterprises, Koukios's claims were compulsory counterclaims arising from the same transaction as MDI's claims. Although they were never adjudicated because of the voluntary dismissal, these claims are now barred by *res judicata*. The trial court did not err by entering

judgment against Koukios on his claim under A-9209214. The eighth assignment of error is overruled.

C. Damages

Koukios asserts in his third assignment of error that the damages awarded by the trial court were against the manifest weight of the evidence. A reviewing court will only reverse on manifest weight when there is no competent, credible evidence in the record to support the trial court's finding. C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus; Chemical Bank of New York v. Neman (1990), 52 Ohio St.3d 204, 207-08, 556 N.E.2d 490, 494.

1. 486/386 Computer Processor

In its first finding relative to damages, the trial court found that MDI ordered

and paid for a 486 Laguna computer, but that Koukios delivered a 386. The trial court also found Koukios liable for $3,200, the difference in value between the two machines. The trial court's findings are stated in terms of breach of contract offer, acceptance, and breach. See, generally, Noroski v. Fallet (1982), 2 Ohio St.3d 77, 79, 442 N.E.2d 1302, 1304 (offer, acceptance); Ketcham v. Miller (1922), 104 Ohio St. 372, 136 N.E. 145 (breach). The trial court, however, did not explain how it arrived at its conclusion. There are three alternative contractual theories under which the trial court could have based its award of $3,200 in damages. Because the alternatives yield different results, we must examine each rationale to determine whether the trial courts damages were

against the manifest weight of the evidence. We find that there is no competent, credible evidence to support any of the three theories; therefore, we agree that the trial court's damages are against the manifest weight of the evidence.

a. Original Written Contract

The first possible basis underlying the award of $3,200 as damages is the written contract between the parties. The contract states that Koukios will supply a computer with either a 386 or 486 processor, and the "exact computer configuration will be selected when needed." (MDI Exh. 2.) The contract also explains that a "typical configuration" for the 386 would cost $14,839, and for the 486, approximately $18,000. The final page of the contract

states that "all hardware will be supplied by [Koukios] at a cost plus arrangement."

The contract contained no promise by Koukios to deliver a 486 at a particular cost. Instead, he was to supply a computer configuration to be selected later at a cost-plus basis. The parties disputed whether the computer he delivered was a 386 or a 486. Both sides agreed, however, that he delivered one or the other, just as the contract required. They also agreed that the computer probably was the most current hybrid version in the technological development of the two different machines. That hybrid form was a 386 version in which a 486 processor had been installed. (T.p. 143, 151-53, 276, 1015 [Koukios]; 375-76, 81112, 842-44, 908

[MDI].) Also, the record does not reflect that he charged a greater price than the 1.4925 cost-plus multiplier agreed upon by the parties.[2] Therefore, the written contract did not justify the trial court's judgment of $3,200 damages.

b. Subsequent Oral Modification

Instead of relying on the written agreement, the trial court may have concluded that Koukios made a subsequent oral binding promise to deliver a 486.[3] Koukios admitted that when he delivered the computer, he told MDI that it was a 486 machine. (T.p. 136.) If the court was

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[2](MDI Exh. 2; Koukios Exh. L.)

[3]Richland Builders, Inc. v. Thome (1950), 88 Ohio App. 520, 527, 100 N.E.2d 433, 437 (consideration required for modification); Osborn vs. Low (1883), 40 Ohio St. 347 (reliance is consideration substitute in contract modification).

correct, as a factual matter, when it concluded that Koukios delivered a 386 machine, Koukios would have breached the subsequent promise to deliver a 486.

Damages for breach of contract based on expectation interest are measured by:

> (a) the loss in the value to the injured party of the breaching party's performance caused by the failure or deficiency, plus
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
> (c) any cost or other loss that the injured party has avoided by not having to perform its obligations under the contract.

Allen, Heaton & McDonald v. Castle Farm Amusement Co. (1949), 151 Ohio St. 522, 86 N.E.2d 782; Restatement of the Law 2d, Contracts (1981) 112, Section 347.

The facts in the record illustrate that the $3,200 figure referred to the difference between two possible computer

configurations that the parties were considering at the time of the contract. (T.p. 134-36.) The figure did not refer to the diminished value to MDI caused by Koukios's alleged breach.

To determine damages in this case, under the assumption that Koukios made a subsequent binding promise to deliver a 486, we must first consider the loss in value caused by the breach. If we accept the trial court's conclusions regarding the value of the machines, the 486 was worth $18,000, and the 386, $14,839.[4] (See, generally, Restatement, supra at 113, Section 347, Comment b, for loss of value in partial performance.) Therefore, the difference between the contract value as promised and value of

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[4](Def. Exh. 2, computed without the 1.4925 multiplier.) See, also, T.p. 133-36.

the computer as delivered was:

486	$18,000
386	-14,839
	$ 3,161

The invoices in the record, however, show that Koukios billed, and MDI paid, $13,028 for the system that was delivered. Concerning the loss that MDI avoided, when a nonbreaching party does not incur expenses that it would have had if the contract had been performed, the nonbreaching party must deduct those amounts from the damages for which the breaching party is liable. Restatement, supra at 115-16, Section 347, Illustrations 6 and 7. In this case, the amount that MDI saved based on Koukios's failure to deliver a 486 was:

486, Subsequent Promise	$18,000
Cost of Machine Delivered	-13,028
	$ 4,972

The amount saved by MDI because of the alleged breach was actually $1,811 greater than the loss in the value to the modified contract. Therefore, even if Koukios promised to deliver the 486, MDI did not have a net expectation loss.

c. UCC Warranty

The final theory under which the trial court may have determined the $3,200 damages was warranty under the Uniform Commercial Code. Under the UCC, modifications to contracts, such as express warranties, do not require consideration. R.C. 1302.12 (UCC 2-209). A seller's representation at the time of delivery can be a binding express warranty. R.C. 1302.26 (UCC 2-313); see, also, UCC 2-313, Comment 7. Also, if a seller admits in court, as Koukios did, that he made a

representation regarding the sale, a modification in a contract for greater than $500 is exempt from the statute of frauds. R.C. 1302.04(C)(2) (UCC 2-201[3][b]). The UCC provides that the measure of damages for breach of warranty is the difference between the value as promised and the value as delivered. R.C. 1302.88 (UCC 2-714). If, again, we accept the trial court's determination that the value of the system as delivered was $14,839, the damages in this case would have been as follows:

Value of 486	$18,000
Value of 386	-14,839
	$ 3,161

The UCC requires, however, that the contract be a transaction in goods. R.C. 1302.02 (UCC 2-102). In a contract, such as this one, for mixed goods and services the burden is on the person seeking to

invoke the UCC warranty remedy to establish that the "predominant factor" of the contract was a sale of goods, not services. Delorise Brown, M.D., Inc. v. Allio, (1993), 86 Ohio App.3d 359, 620 N.E.2d 1020; Allied Indus. Serv. Corp. v. Caste Iron & Metals, Inc. (1977), 62 Ohio App.2d 144, 405 N.E.2d 307 Predominant factor); see, also, Eaton Corp. v. Taylor-Winfield Corp (July 15, 1993), Cuyahoga App. No 62361, unreported (burden of proof).

In this case, MDI did not pursue the predominant-factor theory at trial or on appeal. Therefore, it has not established that the UCC applies. This theory, therefore, also will not support the trial court's damages.

Under these three theories - the written contract, modification of that

contract, and a UCC warranty - there is no competent, credible evidence to support the trial court's $3,200 award to MDI. Therefore, this part of the award for MDI is against the manifest weight of the evidence.

2. Compiler

In another manifest-weight argument concerning damages, Koukios contends that there is no competent, credible evidence that he failed to deliver a compiler as promised by the contract. Koukios, however, admitted that he did not deliver the compiler to MDI. Therefore, this argument is without merit. (T.p. 239 40.)

3. Programming

Koukios also argues that damages for reprogramming his software were not supported by evidence in the record.

The record, however, contains testimony by MDI personnel as well as from Stevelt, the TAT technician, that the work was "intolerable." (T.p. 312, 467, 814.) Based on that testimony, the trial court could have determined that Koukios did not perform his software programming as promised in the contract.

Regarding Koukios's manifest-weight arguments in the third assignment of error, there is no competent, credible evidence to establish a contract theory on which to base the $3,200 damages. Therefore, that portion of this assignment of error is sustained. The portions relating to the compiler and the software are over ruled.

D. Costs

In his seventh assignment of error, Koukios argues that the trial court

incorrectly taxed MDI's deposition expenses as "costs" to the nonprevailing party under Civ.R. 54(D). Unless a statute or rule provides to the contrary or the court otherwise directs, "costs shall be allowed to the prevailing party." Civ.R. 54(D). The costs, however, may not include more than the statutory fees allowed for jurors, witnesses, officers and others. Vance v. Roedersheimer (1992), 64 Ohio St.3d 552, 555, 597 N.E.2d 153, 156; In re Election of Nov. 6, 1990 (1991), 62 Ohio St.3d 1, 4, 577 N.E.2d 343, 345; Muze v. Mayfield (1991), 61 Ohio St.3d 173, 573 N.E.2d 1078.

Court reporters and video technicians who take depositions are 'Officers" whose services properly may be taxed as costs. Election of Nov. 6, 1990

at 4, 577 N.E.2d at 345-46; City of Cincinnati ex rel. Simons v. Cincinnati (1993), 86 Ohio App.3d 258, 620 N.E.2d 940.[5] In the case of expert or videotape

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[5]The holdings of Vance and In re Election effectively overrule the necessary-and-vital test to the extent that it would allow nonstatutory fees to be taxed as costs. See, generally, Jones vs. Pierson (1981), 2 Ohio App.3d 447, 442 N.E.2d 791, 796; see, also State ex rel Schoener (1992), 84 Ohio App.3d 794, 619 N.E.2d 2; Glavan vs. Lincholn Elec. Co. (1992), 78 Ohio App.3d 227, 604 N.E.2d 233; Rice vs. Dudick Corrosion-Proof, Inc. (1989), 57 Ohio App.3d 156, 567 N.E.2d 315; Bookatz vs. Kupps (1987), 39 Ohio App.3d 36, 528 N.E.2d 961; Baby Tenda vs. Jessup (Mar. 16, 1988), Hamilton App. Nos. C-870158, C-870397 (citing Jones for the necessary-and-vital test).

Vance and In re Election also have an effect on Howard vs. Wills (1991), 77 Ohio App.3d 133, 601 N.E.2d 515. The reasoning in Howard is consistent with Vance and In re Election in that it reconfirms the rule that only statutory fees may be taxed as costs. Howard at 138, 601 N.E.2d at 518, fn. 2. The specific holding in Howard - that depositions cannot be taxed as costs - is, however, in conflict with these Ohio Supreme Ccurt cases. Id. at 137-38, 601

depositions, the deposition must be "introduced as evidence" in the trial for it to be taxed as costs. Moore v. General Motors Corp. (1985), 18 Ohio St.3d 259, 261, 480 N.E.2d 1101, 1102-03; Barrett v. Singer Co. (1979), 60 Ohio St.2d 7, 9, 396 N.E.2d 218, 219-20.

In this case, four depositions were filed with the clerk. The only deposition that the trial court charged as costs was the one that MDI took of Koukios. The issue is whether Koukios's deposition, which was used for impeachment only, may be awarded as costs to MDI.

To determine the Ohio Supreme Court's meaning of "introduced as evidence," it is noteworthy that in Moore, the court cited with approval the

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N.E.2d at 518.

appellate case Searles v. Union Central Life Ins. Co. (1936), 55 Ohio App. 85, 8 N.E.2d 586. In Searles, the court, in obiter dictum, said that a deposition could be used at trial for the nonsubstantive purpose of benefiting a party with a pretrial cross-examination of its own witness. Id. at 85, 8 N.E.2d at 586. Therefore, it follows that if a deposition, such as Koukios's, could be taxed as costs if it would assist Koukios with his own pretrial cross-examination, it should also be taxed if it was used by MDI to impeach Koukios at trial.

Also, considering the requirement from Moore and Barrett that a deposition be "introduced as evidence," the Ohio Supreme Court has used the term "introduce" to designate evidence that is used only to impeach a witness. State

v. Ferguson (1983), 5 Ohio St.3d 160, 164, 450 N.E.2d 265, 268; State v. Gardner (1979), 59 Ohio St.2d 14, 16, 391 N.E.2d 337, 340. The court has also denoted nonsubstantive material used to impeach witnesses as "evidence." Redman v. Watch Tower Bible & Tract Society (1994), 69 Ohio St.3d 98, 99, 630 N.E.2d 676, 67. Finally, Civ.R. 32(A) provides that depositions may be "presented as evidence" to impeach the testimony of a witness. Therefore, when MDI read from Koukios's deposition to impeach the witness, the deposition was introduced as evidence within the meaning of Searles, Moore, and Barrett. Other Court of Appeals cases have held that depositions that were used only to impeach witnesses were not properly taxable as costs. See, e.g., Younger v.

Buckeye Local School Dist. (July 8, 1992), Medina App. Nos. 2060, 2065, unreported; Layne v. Toth Buick (Sept. 9, 1992), Summit App. No. 15523, unreported. The cases, however, rely on citations to Jones v. Pierson (1981), 2 Ohio App.3d 447, 442 N.E.2d 791, and Rice v. Dudick Corrosion Proof, Inc. (1989), 57 Ohio App.3d 156, 157, 567 N.E.2d 315, which, in extraordinary circumstances, expressly provide for taxing as costs depositions used only for impeachment.

The court did not abuse its discretion by taxing the cost of Koukios's deposition as costs.

E. Fraud

In his second assignment of error, Koukios contends that the trial court incorrectly allowed MDI to proceed on a fraud claim not pleaded in its complaint.

When a lower court commits error, but the error is not prejudicial to the complaining party, a reviewing court will not reverse. State Farm Fire & Cas. Co. v. Chrysler Corp. (1988), 37 Ohio St.3d 1, 523 N.E.2d 489; O'Brien v. Angley (1980), 63 Ohio St.2d 159, 164, 407 N.E.2d 490, 494; Hallworth v. Republic Steel Corp. (1950), 153 Ohio St. 349, 91 17 N.E.2d 690, paragraph three of the syllabus; Civ.R. 61. When the trier of fact would have made the same conclusions, the appellant has not been prejudiced by the error. Hallworth at paragraph three of the syllabus.

Here, the trial court's written decision discussed each of MDI's claims based on principles of contract. Specifically, the court found that Koukios promised, but failed, to deliver

a compiler and a 486 computer. The court also found that Koukios caused MDI expenses when it corrected mistakes in the software programming he performed. In its decision, the trial court did not find the essential fraud elements involving a material misrepresentation, intent to mislead, reliance, and injury. See, generally, Gaines v. Preterm-Cleveland, Inc., (1987), 33 Ohio St.3d 54, 514 N.E.2d 709. Therefore, if the court did err by allowing MDI to pursue fraud claims, it did not base its decision on those grounds, and the outcome of the trial would not have been different in the absence of the error. The assignment of error is overruled.

F. Abuse of Discretion: Compel Testimony, Continue Trial, Qualify Expert

In his fourth, fifth, and sixth

assignments of error, Koukios challenges rulings of the trial court that are controlled by the abuse-of-discretion standard. Abuse of discretion is more than an error of law or judgment, it "implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable." Ruwe v. Board of Twp. Trustees of Springfield Twp. (1987), 29 Ohio St.3d 59, 61, 505 N.E.2d 957, 959. Only when there is no sound reasoning process to support the trial court's decision will the reviewing court reverse on an abuse of discretion argument. AAAA Enterprises, Inc. v. River Place Community Urban Redevel. Corp. (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601; Eckert v. Jacobs (Nov. 25, 1992), Hamilton App. No. C-910445, unreported. The first of these

assignments addresses the trial court's refusal to compel discovery and to grant a continuance. The motion to compel discovery related to deposing Fred McDowell, owner and president of TAT. The record contains an affidavit stating that McDowell had been retained by MDI in anticipation of litigation and that he was not scheduled to testify at trial. Therefore, because of a sound reason for the trial court to deny the motion under Civ.R. 26, Koukios has not shown an abuse of discretion. See, generally, Bungler v. Cincinnati (1986), 25 Ohio St.3d 338, 342, 496 N.E.2d 912, 915 (error in record); Owens v. Bell (1983), 6 Ohio St.3d 46, 451 N.E.2d 241, 247 (Celebrezze, C.J., concurring) (nontestifying experts retained for litigation); State ex rel. Kuczak v.

Saffold (1993), 67 Ohio St.3d 123, 125, 616 N.E.2d 230, 232 (presume regularity); Civ.R. 26(4)(b).

As to Koukios's motion to continue the trial date, the record shows the trial court already had granted Koukios a continuance in a previously scheduled arbitration. In this request, Koukios asked for a minimum ninety-day delay in the trial date. Considering the previous arbitration delay, the length of this request, and the trial judge's discretion to determine interests of docket control and judicial economy, the trial court did not abuse its discretion when it denied the continuance. See, generally, State v. Grant (1993), 67 Ohio St.3d 465, 479, 620 N.E.2d 50, 67; State v. Unger (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078 (both showing factors for

granting a continuance).

In the fifth assignment of error, Koukios argues that the trial court abused its discretion by granting a protective order as to McDowell's testimony. Because the affidavit in the record reflects that a sound reason was available to the trial court to determine that McDowell was retained in anticipation of litigation and would not testify at trial, it did not abuse its discretion by granting MDI's protective order. State ex rel. Grandview Hosp. & Medical Ctr. v. Gorman (1990), 51 Ohio St.3d 94, 554 N.E.2d 1297 (discretion in granting protective orders under Civ.R. 26[C]); (T.d. 41). The fifth assignment of error is overruled.

In the sixth assignment of error, Koukios contends that the trial court

improperly qualified Thomas Stevelt, a TAT computer technician, as an expert. The evidence shows that Stevelt's testimony was based on his knowledge of software, his skill in programming, and his experience as a computer technician. Therefore, there is evidence that Stevelt's testimony would assist the court to understand the evidence in this case. Koukios, accordingly, has not shown an abuse of discretion, and the sixth assignment of error is overruled. Ishler v. Miller (1978), 56 Ohio St.2d 447, 384 N.E.2d 296 (admissibility of expert testimony); In re Ohio Turnpike Comm. (1955), 164 Ohio St. 377, 131 N.E.2d 397 (competency of expert); Evid.R. 702. (T.p. 808-92.)

III. CROSS-ASSIGNMENTS OF ERROR

MDI argues, in its first

cross-assignment of error, that the trial court abused its discretion when it refused to allow Stevelt to express his opinion on the general prognosis for and future cost of repairs to the MDI system. The transcript shows that the trial court could have reasonably concluded that these opinions of future performance were fraught with speculation and were not helpful in deciding whether Koukios had already breached his contract and caused MDI any portion of its alleged $28,350 in damages. Bostic v. Connor (1988), 37 Ohio St.3d 144, 524 N.E.2d 881, paragraph three of the syllabus; Evid.R. 704. (T.p. 89496.) The first cross-assignment of error is overruled.

In its second cross-assignment of error, MDI maintains that the trial court

abused it discretion by not taxing its expenses for copying Koukios's depositions of Thomas Stevelt, Donna Jennings, who was president of MDI, and Sue Ray, an MDI employee. MDI's expenses in these depositions, unlike the costs in Koukios's deposition, were not for the "officers"' fees, as required by Vance. Its expenses were merely for obtaining personal copies of the depositions. (T.d. 95.) Therefore, the trial court's reason for not taxing the depositions as costs was based on a sound premise. Vance at 555, 597 N.E.2d at 156; Simons at 258, 21 620 N.E.2d 940. The second cross-assignment of error is overruled.

MDI asserts in it third cross-assignment of error that the trial court abused its discretion by not granting attorney fees to MDI for the

expenses of getting a dismissal of Koukios's refiled complaint. Under R.C. 2323.51, the court may assess attorney fees when a party files a civil action that is "not warranted under existing law and cannot be supported by a good faith argument for extension, modification, or reversal of existing law." Under Civ.R. 11, the court may take "appropriate action" when a party's suit has no ground to sustain it. Here, the rule that disposed of refiled compulsory counterclaims on the basis of *res judicata* was not articulated by the Ohio Supreme Court until Rettig Enterprises, nearly a year and a half after Koukios filed his second complaint. We find nothing to substantiate MDI's argument that Koukios's second complaint was frivolous and not supported by good

grounds. Therefore, the trial court did not abuse its discretion by denying MDI's motion for attorney fees. See, generally, State ex rel. Fant v. Sykes (1987), 29 Ohio St.3d 65, 505 N.E.2d 966 (Civ.R. 11); Rossi v. Corning Glass Works, Zircoa Div. (1992), 84 Ohio App.3d 22, 25, 616 N.E.2d 258, 260 (R.C. 2323.51). The third cross-assignment of error is overruled.

MDI challenges, in its fourth cross-assignment of error, the trial court's denial of punitive damages and inadequate findings of fact. The trial court's findings of fact were sufficient to discern that punitive damages were not allowed because the breach of contract did not rise to the level of tortious conduct. Digital & Analog Design Corp. v. North Supply Co. (1989),

44 Ohio St.3d 36, 540 N.E.2d 1358; Davis v. Tunison (1959), 168 Ohio St. 471, 424, 155 N.E.2d 904, 906; Overt v. Pilot Life Ins. Co. (1991), 77 Ohio App.3d 529, 545, 602 N.E.2d 1219. Because the trial court's written decision is based solely on breach of contract principles, the fourth cross-assignment of error is overruled on the authority of Finn v. Krumroy Constr. Co. (1990), 68 Ohio App.3d 480, 487-88, 589 N.E.2d 58, 63.

The fifth cross-assignment of error asserts that the damages were against the manifest weight of the evidence because the trial court did not award more than $5,650 to MDI. In its first counterclaim, MDI alleged that it sustained $20,000 damage because it overpaid Koukios for services bargained

for in the contract. In the third counterclaim, MDI further argued that it sustained $8,350 for TAT's repairs to the software. Koukios presented his own testimony that errors in the software were typical in the type of programming work requested by MDI. (T.p. 53-62.) Even though MDI presented testimony to the contrary, there was competent, credible evidence to support the factual finding that the $28,350 in expenses were not all caused by Koukios's breach of contract. The fifth cross-assignment of error is overruled.

IV. CONCLUSION

That portion of Koukios's third assignment of error that deals with the damages for the 486 computer is sustained. The balance of that assignment of error is overruled. All

other assignments and cross-assignments of error are overruled. Based on the authority of App.R. 12(C), the judgment appealed in C-920913 is reversed in part and the cause is remanded with instructions to the trial court to enter judgment for MDI, minus the $3,200, for a total of $2,450. In all other respects, the judgment appealed in C-920913 and C-920918 is affirmed. The judgment, as appealed in C930289 and C-930555, is affirmed.

SHANNON, P.J., GORMAN, J., CONCUR. M.B. BETTMAN, J., DISSENTING IN PART.

M.B. BETTMAN, J., DISSENTING IN PART.

I am pleased that the majority has rejected Jones v. Pierson, on which the trial court relied, as a method for determining costs. I believe that the

test developed in Jones, i.e., taxing necessary-and-vital litigating expenses, has no viable legal basis and has been applied by numerous courts by rote for too long. The necessary-and-vital test is contrary to a full range of Ohio Supreme Court decisions on costs. See, generally, State, ex rel. Comers. of Franklin Cty. v. Guilbert (1907), 77 Ohio St. 333, 83 N.E. 80 (expert witness fees in criminal prosecutions); Benda v. Fana (1967), 10 Ohio St.2d 259, 227 N.E.2d 197 (R.C. 2311.17, 2311.18); Centennial Ins. Co. v. Liberty Mutual Ins. Co. (1982), 69 Ohio St.2d 50, 430 N.E.2d 925 (premium paid on supersedeas bond); Muze v. Hayfield (1991), 61 Ohio St.3d 173, 573 N.E.2d 1078 (Civ.R. 41[D] attorney fees); Skaggs v. Lima Mem. Hosp. (1991), 62 Ohio St.3d 296, 581 N.E.2d 1085 (Civ.R. 41);

In re Election of November 6, 1990 (1991), 62 Ohio St.3d 1, 577 N.E.2d 343 (R.C. 3515.11 election costs); Vance v. Roedersheimer (1992), 64 Ohio St.3d 552, 597 N.E.2d 153 (local rules). In each of these contexts the court has affirmed the American rule - recoverable costs are only those fixed and taxable according to statute. See, also, the excellent analysis of Jones by Judge Stephenson in Howard v. Wills (1991), 77 Ohio App.3d 133, 138, 601 N.E.2d 515, 518, fn.2.

I also agree with the majority that, under Moore and Barrett, only depositions actually introduced into evidence can be taxed as costs. I do not agree, however, that depositions used only for impeachment are "introduced as evidence." In both Moore and Barrett, the depositions were of expert witnesses,

whose testimony was intended to be introduced in evidence as substantive testimony at trial. Moore at 260, N.E.2d at 1102; Barrett at 7, 396 N.E.2d at 218.

I agree with those cases that have not allowed costs for depositions used only for impeachment. Younger v. Buckeye Local School Dist. (July 8, 1992), Medina App. Nos. 2060, 2065, unreported; Layne v. Toth Buick (Sept. 9, 1992), Summit App. No. 15523, unreported. Although they rely on Jones v. Pierson, which we all today disavow, these cases properly recognize that depositions used only for impeachment should not be taxed as costs. Finally, I believe that, even when depositions are used as substantive evidence, the party moving for costs should have the burden of presenting evidence in the record to show the basis

of the expenses. Just as in the case of attorney fees, this practice would be a guard against unreasonable costs being taxed to the nonprevailing party. In re Estate of Verbeck (1962), 173 Ohio St. 557, 559, 184 N.E.2d 384, 385; Swanson v. Swanson (1976), 48 Ohio App.2d 85, 90-97, 355 N.E.2d 894, 898-900. In this case, there is no evidence of record showing the cost of Koukios's deposition, or other information such as whether it was an original, a copy, or was expedited. What does appear of record, however, is the fact that only one sentence of Koukios's deposition was used for impeachment, which, to me, underscores one aspect of the unfairness of the majority view on this point.

For these reasons, I dissent on Koukios's seventh assignment of error.

In all other respects, I concur with the majority.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

THE SUPREME COURT OF OHIO

1995 TERM

To wit: March 1, 1995

Evans Koukios, d.b.a Scientific Information Systems	:	Case No. 94-2265
Appellant,	:	E N T R Y
v.	:	
Marketing Dynamics, Inc.	:	
and	:	
Total Access Technologies	:	
Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C930289)

THOMAS J. MOYER
Chief Justice